State Personnel Board, State of Colorado

Case No. 97 B 174 (C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PATRICIA LOPEZ,

Complainant,

V.

DEPT. OF HUMAN SERVICES, OFFICE OF OPERATIONS,

Respondent.

Hearing on this matter was held January 26, 1998 through January 28, 1998, and on February 2, 1998 before Administrative Law Judge G. Charles Robertson at 1525 Sherman Street, State Personnel Board Hearing Room B-65, Denver, CO 80203.

MATTER APPEALED

Complainant appeals (1) a disciplinary reduction in pay grade; and (2) the subsequent disciplinary termination of her employment. For the reasons set forth below, Respondent's actions are **UPHELD**

PRELIMINARY MATTERS

Respondent, Department of Human Services ("DHS" or "Respondent") was represented by Toni Jo Gray, Assistant Attorney General. Complainant, Patricia Lopez ("Complainant" or "Lopez") was represented by Nora V. Kelly, Attorney at Law.

1. Procedural History

Complainant filed a Notice of Appeal on June 30, 1997 ("Appeal #1"), which was docketed as case number 97 B 174. This appeal was based upon the imposition of discipline, in the form of a reduction in pay grade of two steps, ranging from \$2,849 per month to \$2,584 per month. On November 28, 1997, Complainant filed a Notice of Appeal ("Appeal #2") which was docketed as case number 98 B 061. The basis for Appeal #2 was the imposition of a disciplinary termination of Complainant effective November 18, 1997.

On December 26, 1997, the administrative law judge ("ALJ") issued an order consolidating cases 97 B 174 and 98 B 061.

2. Award of Sanctions

On September 17, 1998, the ALJ issued an order awarding attorney fees to Respondent for the preparation of Respondent's Motion for Sanctions and for Respondent's Response to Complainant's Response to Respondent's Motion for Sanctions. As grounds for the order, the ALJ noted that the Complainant (1) failed to timely comply with the Notice of Hearing and its terms for rescheduling a hearing, (2) failed to timely comply with the Prehearing Order in producing a timely prehearing statement, (3) caused a delay of the proceedings, and (4) delayed the production of discovery pursuant to the Board's prehearing order.

3. Motion To Compel

On January 26, 1998, at the time of hearing, Complainant filed a Motion to Compel ("Complainant's Motion") with the ALJ. A status conference had been held on January 12, 1998 in which the ALJ issued a procedural order regarding outstanding discovery. That order reflects that the parties had stipulated to Complainant propounding any written discovery requests by January 13, 1998 and that Respondent was to have any documents with regard to Complainant's requests available for inspection in Pueblo, CO by the afternoon of January 16, 1998. Complainant argued that she was unable to review all of the documentation requested in the discovery request. The discovery request was for all documents relating to the "1,437 past due notices" which were referred to in a November 18, 1997 letter to Complainant from Donna Muench. Complainant argued that some, but not all of the documents were produced. Initially, the ALJ denied the motion to compel pending the introduction of any evidence. Subsequently, after Respondent offered to admit evidence, Complainant renewed her objection.

After taking evidence from the parties and witnesses who participated in the production of written discovery, the ALJ denied the renewed motion to compel based on an interpretation of Board Rule R10-8-2, 4 CCR 801-1, C.R.C.P. 37, and C.R.E. 1006. The ALJ held that it was clear from the pleadings filed in this matter, including both parties' request to consolidate the matter, that discovery had to be conducted in an expeditious fashion. Despite this matter having been consolidated on December 26, 1997, Complainant failed to propound any discovery requests timely. As a result of the status conference, Complainant was given an opportunity to conduct discovery. On January 16, 1998, Complainant and Complainant's counsel reviewed only a handful of documents. They clearly did not review 1,437 past due notices. Instead, they reviewed approximately 60 files. However, neither Complainant nor her counsel requested additional documents. No additional requests for documentation were made by Complainant. As a result, the ALJ ruled that (1) the issue with regard to compelling discovery, not raised until the day of hearing, was untimely, and (2) the parties had previously stipulated to the terms of discovery.

4. Witnesses

Respondent called 4 witnesses including: (1) Robert Provost, Accountant II, at CMHIP, South Central Accounting District, Pueblo, CO; (2) Arlene Walding, Director of General Accounting at CMHIP, South Central Accounting District, Pueblo, CO; (3) Linda Braun, Human Resource Administrator for South Central Accounting District for Personnel; and (4) Donna Muench, Office of Operations, South Central Accounting District, Pueblo, CO.

Complainant called nine witnesses which included: (1) Linda Servics, Accounting Technician, CMHIP, Pueblo, CO; (2) Tim Boyd, former Accounting Technician III, CMHIP, Pueblo, CO; (3) Complainant, Patricia Lopez; (4) Sara Adame, Accounting Tech II, CMHIP, Pueblo, CO; (5) Larry Chavez, Forensic Security Officer II, CMHIP, Pueblo, CO; (6) Martha Kinnaird, CMHIP, Pueblo, CO; (7) Christine Rinks, Program Assistant II, Medical Services Unit, CMHIP, Pueblo, CO; (8) Margaret Bennett, Director of Medical Surgical Services - Geriatrics, CMHIP, Pueblo, CO; and (9) Judy Straight, Century Health (St. Mary's-Corwin Hospital), Pueblo, CO.

5. Exhibits

The parties stipulated to the authenticity of Respondent's exhibits 8, 9, 10, 23, 25, 27, and 29.

DHS's exhibits 1 -12, 14 - 45, 48 - 50, 52 - 61, 64 - 80, and 82 were admitted into evidence without objection. Exhibit 13 was not offered into evidence. Exhibit 46 was admitted over objection. Exhibit 47 was entered into evidence as part of Complainant's case-in-chief. Exhibit 51 was not admitted. Exhibit 62 was admitted by way of stipulation. Exhibit 63 was

admitted over objection. Exhibit 81 was admitted in Complainant's case-in-chief.

Complainant's Exhibits E - N were admitted into evidence by way of stipulation during Complainant's case-in-chief. Complainant's Exhibits AA and AB were admitted into evidence without objection.

6. Sequestration Order

A sequestration order which instructed witnesses not to discuss this matter or their testimony with other witnesses during the course of the hearing was entered at the commencement of the hearing.

ISSUES

I. Disciplinary Action - Reduction in Pay Administered June 20, 1997.

- 1. Whether Complainant engaged in the acts for which discipline was imposed;
- 2. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority;
- 3. Whether the delegation of appointing authority was conducted pursuant to the State Personnel Board rules; and
- 4. Whether the actions of Respondent were otherwise arbitrary, capricious, or contrary to rule or law.

II. Disciplinary Action - Termination from Service on November 18, 1997.

- 1. Whether Complainant engaged in the acts for which discipline was imposed;
- 2. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority;
- 3. Whether the delegation of appointing authority was conducted pursuant to the State Personnel Board rules; and
- 4. Whether the actions of Respondent were otherwise arbitrary, capricious, or contrary to rule or law.

STIPULATED FACTS

- 1. Lopez was employed by DHS as an Accounting Technician III and was certified in that position.
- 2. Lopez began her employment with DHS on September 9, 1974.
- 3. Lopez was employed primarily to provide accounting for the outside medical services contracted for by the Respondent's Colorado Mental Health Institute at Pueblo ("CMHIP").
- 4. CMHIP is a large psychiatric hospital, there are many specialized medical services which it pays entities in the Pueblo, CO area to perform.
- 5. On March 16, 1997, Donna Muench directed Complainant to process payment for the July through November services listed on the Pueblo Radiological Group statement dated February 3, 1997, no later than Friday, March 21, 1997.
- 6. Complainant was to report her progress before 5:00 p.m. on March 18, 1997.
- 7. Complainant responded that she was progressing slowly and had many interruptions. However, at this time daily duties were still required.
- 8. Complainant left four checks clipped together in the accounting vault for the purpose of locating missing documentation.
- 9. Complainant documented that she received the \$150.00 check from Pueblo Radiological Group on October 25, 1996.
- 10. Complainant signed that she received a \$732.60 check from Physician Anesthesia of Pueblo on December 31, 1996.
- 11. Complainant entered that she received the \$386.00 check from Southern Colorado Pathologists Laboratory on January 16, 1997.
- 12. Complainant logged that she received a \$58.80 check from Parkview Hospital on January 24, 1997.
- 13. Donna Muench scheduled an R8-3-3 meeting with Complainant.
- 14. The R8-3-3 meeting was held on June 3, 1997.
- 15. At the R8-3-3 meeting, Complainant stated she had not deposited the checks cited above

because she lacked documentation regarding what the checks reimbursed.

FINDINGS OF FACT

1. During the course of Lopez's career with the State of Colorado, she has received annual Performance Planning and Appraisal ("PACE") Forms and evaluations, which can be summarized as follows:

Position	Period/Date	Ratings	
Accounting Tech IV	10-1-88 to 4-1-89	Above Standard (old evaluation form)	
Accounting Tech IV	10-1-89 to 10-1-90	Commendable	
Accounting Tech IV	10-1-90 to 10-1-91	Commendable	
Accounting Tech IV	10-1-91 to 10-1-92	Commendable	
Accounting Tech IV	10-1-92 to 10-1-93	Commendable	
Accounting Tech III ¹	3-1-95 to 11-1-96	Good	
Accounting Tech III	11-1-96 to 11-1-97	Good	
Accounting Tech III	5-1-97 to 6-30-97 (close out)	Needs Improvement	
Accounting Tech	7-1-97 to 8-31-97 (Interim)	Needs Improvement	
Accounting Tech III	9-1-97 to 10-31-97	Needs Improvement	

2. Complainant refused to sign the evaluation for the period ending June 30, 1997. Complainant disagreed with the evaluations completed in October 1997 and November,

¹Complainant voluntarily reduced her position from an Accounting Technician IV to Accounting Technician III when the provisions of an Accounting Technician IV were revised to include supervision of other employees. Complainant was not responsible for the supervision of employees.

1996.

- 3. During the relevant time frame of the appeals, Complainant was initially supervised by Bob Provost ("Provost"). Subsequently, Complainant was supervised by Arlene Walding ("Walding"). Walding reported to Donna Muench ("Muench") who was Chief Financial Officer for the Southern District.
- 4. Complainant disagreed with the evaluation portion of the following PACE's for periods ending on: August 1997, October 1997, November 1997, and November 1996. Complainant refused to sign a PACE evaluation for the period ending October 1990 even though the rating was commendable.
- 5. In November 1995, Complainant and Tim Boyd ("Boyd") attended a Joint Budget Committee hearing on the subject of CMHIP. Upon returning from the meeting, Complainant and a number of other employees were advised that they were not to communicate with the Legislature without prior authorization in order to preserve confidentiality. After the meeting, no repercussions were felt by staff.
- 6. Pueblo Radiological Group ("PRG") is an independent medical service facility. PRG sent statements of accounts past due to Complainant on the following dates and for the following periods:

Date	For Periods		
January 8, 1996	November 1995, December 1995, October 1995, September 1995,		
	August 1995, July 1995		
March 25, 1996	February 1996, January 1996, November 1995, December 1995		
	October 1995, September 1995, July 1995		
August 7, 1996	June 1996, May 1996, April 1996, March 1996, February 1996,		
	November 1995, December 1995, September 1995, July 1995		
November 7,	September 1996, August 1996, July 1996, June 1996, May 1996,		
1996	April 1996, March 1996, February 1996, January 1996		
November 25,	October 1996, September 1996, August 1996, July 1996, June		
1996	1996, May 1996, April 1996, March 1996, February 1996, January		
	1996		
December 23,	November 1996, October 1996, September 1996, August 1996,		
1996	July 1996, June 1996, May 1996, April 1996, March 1996,		
	February 1996, January 1996		
February 3, 1997	December 1996, November 1996, October, 1996, September 1996,		
	August 1996, July 1996, June 1996, May 1996, April 1996, March		
	1996, February 1996, and January 1996.		

- 7. From mid-July through the first half of September, 1996, Complainant was on leave from her position. During that period of time, her immediate supervisor at the time, Provost, was tasked with covering her work load.
- 8. Upon Complainant's return to work, Complainant was presented a memorandum dated September 17, 1996, from Walding and Provost, generally indicating that the organization of her desk was unacceptable, her filing procedures were unacceptable, her methods of processing "5500" forms was unacceptable, and that complaints had been received regarding outstanding invoices. The letter provided an outline of procedures to be implemented which would help prevent any additional problems. The letter was not signed by any of the parties nor was it a formal corrective action.
- 9. On January 28, 1997, a memorandum from Walding was sent to Complainant regarding past due notices for the St. Mary Corwin ("SMC") account. The memorandum specifically referenced that a conversation was held on September 17, 1996 discussing past due accounts. This memorandum referenced a number past due notices from SMC and directed that they be processed and completed by February 21, 1997.
- 10. On February 26, 1997, Complainant received a corrective action which Complainant signed. This Corrective Action was based on Complainant failing to timely review email, failing to communicate with her supervisor or the delegated appointing authority, and failing to timely process past due accounts as requested in (a) the September 17, 1996 letter; (b) subsequent communications through December, 1996; and (c) the January 28, 1997 memorandum. The Corrective Action directed Complainant to process invoices within 45 days, comply with the Fiscal Rules of Colorado, and update the "5500" log. The Corrective Action provided that all past due notices had to be processed, or a written explanation why they had not been processed by March 31, 1997.
- 11. On March 12, 1997, Complainant filed a grievance of the Corrective Action.
- 12. Pending the grievance process, on March 16, 1997, Donna Muench e-mailed Complainant and directed Complainant to process the payments for the July through November services listed on the PRG statement dated February 3, 1997. The e-mail stated that the processing of such payments was to be completed by March 21, 1997, 5 days later.
- 13. Complainant responded, via e-mail, that she was progressing slowly and would "work towards Friday." Muench followed up, via e-mail, and directed that Complainant was to make the July through November services priority and handle only emergencies until Complainant had processed these payments for services.
- 14. Complainant failed to complete the processing of the July through November, 1996

payments.

15. Board Rule R1-4-2, entitled Delegation, provides, in part:

The appointing authority may delegate authority for all personnel functions and actions.

Unless otherwise specified in these rules, such delegation need not be in writing so long as the appointing authority ratifies the action taken. The appointing authority is presumed to have ratified the action taken unless he takes specific action to countermand it within a reasonable period of time.

The delegee may further delegate authority for personnel functions and actions only if, and to the extent, authorized to do so in writing by the appointing authority.

- 16. Patrick Horton, Manager of Office of Operations, the appointing authority, delegated his appointing authority in writing to Muench on or about January 19, 1995 and ratified such action in a memo dated July 17, 1997.
- 17. Subsequent to March 21, 1997, Muench reviewed payment vouchers which were issued by the Office of Operations demonstrating which invoices/accounts/bills have been paid. The past due accounts of PRG for July through November were not identified as having been paid. Instead, Complainant processed past due accounts for a period other than July through November, 1996.
- 18. By way of certified letter, on March 25, 1997, Muench notified Complainant of an R8-3-3 meeting in order to determine if there was cause for possible corrective action or discipline.
- 19. On April 23, 1997, Complainant was provided an interim PACE plan evaluation indicating an overall rating of *needs improvement*. In the performance plan portion of the PACE, it was indicated that Complainant was failing to make payments within 45 days and failing to timely process invoices.
- 20. On April 28, 1997, the Corrective Action filed on March 12, 1997 was concluded at Step 2 of the Grievance Process by way of a decision from Muench. The Corrective Action was upheld. Complainant failed to timely appeal the Step 2 decision.
- 21. On May 28, 1997, Muench received a memo from Arlene Walding ("Walding") indicating that four checks were found in the vault, dated as recited in the stipulated facts above. Muench notified Complainant that additional information would be considered at the R8-3-3 meeting noticed on March 25, 1997.

- 22. State of Colorado Fiscal Rule 6-1, dated February 24, 1948 and revised September 1, 1995, provides states that a "state agency that receives money for any reason shall make timely deposits to the State Treasury, unless otherwise provided by statute or fiscal rule. All money received and not depositing during the month shall be deposited on the last working day of the month."
- 23. Policy No. 26.15, CMHIP, within the Finance Section of the policies, provides that all receipts are to be deposited on the next business day to General Accounting and must not be held by the division/department.
- On June 3, 1997, the R8-3-3 meeting originally noticed in March was held. Complainant was represented by James Peaslee, C.A.P.E. representative.
- 25. During the R8-3-3 meeting, Complainant admitted that the requested payments of past due invoices for July through November were not processed, taking the position that the payments/invoices/bills had to be processed as a group. Prior to the R8-3-3 meeting, Complainant failed to advise Muench of this position. Complainant submitted a written statement stating that processing the payments as a group was a reasonable explanation and that if the matter was so urgent, her direct supervisor and the Director of the Office of Operations should have been made aware.
- On June 20, 1997, discipline was imposed on Complainant for failure to process the past due invoices for PRG for July through November 1996 and for failure to deposit checks timely pursuant to fiscal rule. The discipline consisted of a two step reduction in pay grade with the opportunity to increase pay grades upon two consecutive 300 point (Good) evaluations to be conducted every two months.
- 27. On July 10, 1997, a corrective action was issued by Muench which including the following:
 - a) all invoices must be processed within 45 days of receipt;
 - b) problem invoices were to be brought to the attention of the supervisor;
 - c) open communication is to occur with Complainant's supervisor;
 - d) communication must be timely; and
 - e) review the fiscal rules.
- 28. On July 10, 1997, a Performance Planning and Appraisal Form evaluation was completed by Complainant's supervisor for the period Provost, and signed by Walding. Complainant disagreed with the Performance Plan authored on May 1, 1997 and refused to sign the evaluation on July 10, 1997.
- 29. On August 1, 1997, a new PACE was executed covering the period of July 1, 1997 to

August 31, 1997. This PACE was drafted pursuant to the disciplinary action imposed on June 20, 1997. In this PACE, a planning narrative was included which stated that Lopez was to use a spreadsheet to complete the 5500 Logs, use e-mail for internal correspondence, discuss with supervisor any potential problems, and to address the issues which had been raised in the past. In addition, the narrative included suggestions as to how to improve organization, communication, and how to improve time management.

- 30. On September 19, 1997, an evaluation for the PACE dated July 1, 1997 to August 31, 1997, was completed. Under the performance appraisal narrative, it was noted that Lopez had made some improvement and was processing current invoices in a more timely manner. It was also noted that Complainant had somehow made it difficult to track the records associated with paying past due invoices. The overall rating was *needs improvement*.
- On September 22, 1997, the next PACE was drafted. Complainant was evaluated on October 29, 1997 and given a rating of *needs improvement*. The PACE plan included many of the same elements as outlined in the previous PACE. As required by the form, comments were provided explaining the rating. The comments included that Lopez was processing invoices more timely but that some were still being processed beyond the 45 days as required by fiscal rule. The comments also state that Lopez was not communicating well with her supervisor and that it was difficult for the supervisor to obtain accurate information with regard to past due invoices. The comments also noted that past due invoices were being referred by the vendor to collection agencies in September and October, 1997, because they were so overdue.
- 32. State Personnel Board Rule R8-2-5, provides in part:
 - Employees performing at an overall level of Needs Improvement shall be given a corrective action for the initial needs improvement rating and afforded a period of time to improve performance as provided in R8-3-2(B). If, when re-evaluated, the employee's rating is Needs Improvement or Unacceptable, such rating is the basis for disciplinary action. Following a R8-3-3 meeting, absent extraordinary circumstances, the employee shall be dismissed, or at the discretion of the appointing authority, demoted if the employ has demonstrated competence at a lower level.
- 33. State Personnel Board Rule R8-3-2, entitled Corrective Actions, provides in part:
 - Corrective actions are intended to correct and improve an employee's job performance or behavior in a formal, systematic manner . . .

When the reason for a corrective action is a performance problem, the appointing

authority can use either the written corrective action format or the performance appraisal system. . . .

- 34. On November 10, 1997, a second Rule R8-3-3 meeting was held. This R8-3-3 was based on two interim and one annual consecutive PACE evaluations which had ratings of needs improvement. Discipline was imposed, in the form of termination of employment for failure to comply with standards of efficient service or competence and willful failure to perform duties assigned.
- 35. During this entire time frame, the South Central Accounting Office was in transition into a new computer system consisting of various modules. The only operating module involved pharmaceuticals and the module did not contain data regarding outside medical services provided to patients.

DISCUSSION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994*). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

Respondent argues that Complainant was disciplined and eventually terminated from employment because she failed to take direction from supervisors, failed to process past due accounts for which she was responsible and failed to timely perform her other duties. Respondent maintains that despite having interim performance evaluations, corrective actions and disciplinary actions, Complainant failed to improve her performance in processing past due invoices, in communicating with supervisors and management as to issues involved in

processing such past due invoices, and in taking responsibility for her job duties. As a result, Complainant had to be first disciplined, and then terminated pursuant to Board rules.

Complainant argues that the actions of Respondent are arbitrary and capricious. First, Complainant argues that there was an improper delegation of appointing authority in the course of Complainant being disciplined in June 1997. Further, Complainant argues that she was overworked, that the problems associated with the past due invoices are in part a result of her medical leave, and that Complainant was not given necessary tools for completing her job. Complainant maintains she was unaware of the impact of failing to more timely process past due invoices. Complainant also maintains that Respondent retaliated against her for attending a JBC hearing. Complainant argues that she did not willingly fail to perform her duties.

I.

With regard to discipline imposed through the reduction in pay grade, it is clear that Respondent has met its burden of proof demonstrating that Complainant failed (1) to comply with a specific order of completing the processing of past due notices for the period July 1996 through November 1996; and (2) failed to timely deposit received checks, or direct those checks to the appropriate work unit for processing.

Up to October 1993, Complainant had commendable performance ratings. However, by the Fall of 1996, Complainant's performance began to decline. Part of this may have been a result of Complainant's absence from work for medical leave during July, August, and September 1996. However, the testimony provided suggests that there was some coverage of the Complainant's desk during her leave but that because of the way her desk was maintained, her supervisor was unable to adequately cover the responsibilities of Complainant's job. It cannot be ignored that even prior to Complainant's absence, she was behind in her work. A number of exhibits were introduced demonstrating that past due invoices were not being processed timely. While one must note that some of the information on the exhibits was cumulative, the evidence suggests that outstanding invoices were not being processed for up to one year. For instance, in correspondence from PRG, dated December 23, 1996, PRG stated that past due invoices from January of that year remained unpaid. Memos to Complainant on September 17, 1996 and January 28, 1997 also indicated that past due invoices, not including those received during Complainant's absence, were not being processed timely.

In reviewing the documentary evidence, it is clear that past due invoices were *eventually* being processed. For example, in PRG's correspondence dated March 25, 1996, there were 25 past due invoices for January 1996. In PRG's correspondence dated February 3, 1997, only 2 past due invoices existed for January 1996. Still, it is clear that past due invoices were taking more than 45 days to process. As a result, the state was finding that it could, and sometimes had to, defend itself in collection actions brought about by unsatisfied vendors. To work in an

accounting division of a state agency and to maintain that she was not aware of the potential impact of failing to timely process invoices is disingenuous at best. Besides, Complainant testified that she interacted with various other individuals in the accounting department when she received checks or needed to locate information. It is not credible to believe that after working for the state since 1974 in the area of accounting that Complainant was not aware of the consequences of failing to pay or process past due invoices.

Respondent had given a direct order to Complainant to complete the processing of a number of past due invoices. Complainant failed to comply with that order. Instead, Complainant made excuses. Complainant's argument that the past due invoices as submitted by vendors had to be processed as a group is incredible. No evidence was presented which substantiated this argument. Complainant further indicated that if timing was so important, her supervisors should have been notified at that time. The fact that Complainant's supervisors may not have been aware of the urgency of a particular matter is not an excuse for failing to comply with a direct order from a supervisor. It is clear that Complainant simply failed to communicate during the course of performing her duties, she failed to keep her supervisors advised as to the status of past due accounts, and failed to document legitimate reasons why past due notices were not processed timely.

In addition, it is not credible to believe that Complainant was not aware of state fiscal rules and how they might be applied. As a result, the fact that Complainant received 4 checks and failed to deposit them is inexcusable. Complainant argues that since she could not determine the services for which the checks were associated, she kept them in the safe...and then forgot about them. Again, this demonstrates incompetence. Alternative procedures could have been implemented so as to allow the checks to be deposited pending an identification of the reason such checks were received. Complainant testified that in the course of performing her duties, she would work with other individuals in the office to help process past due notices. Surely, in the course of performing her duties Complainant could have asked what to do with the checks. Especially when Complainant admitted interacting with staff who were responsible for dealing with accounts receivable.

At the time discipline was imposed, Complainant was under a corrective action issued on April 28, 1997. That corrective action had resulted from an interim evaluation indicating Complainant was failing to timely process past due invoices. The discipline imposed upon Complainant subsequent to the corrective action, for failure to comply with the direct order and for failure to deposit checks, was within the range of reasonable alternatives. Her pay was reduced 2 steps and she was given the opportunity to regain those lost steps in pay if she successfully completed two consecutive interim PACE evaluations with a rating of 300 or higher. Given the excuses made by Complainant for failing to comply with the direct order and for failure to deposit the checks, the discipline imposed represented progressive discipline and a "measured response." The fact that Complainant was already under corrective action for failure to timely process past due invoices only indicates that Respondent was implementing

progressive discipline.

II.

Since the Fall of 1996, Respondent was concerned about Complainant's performance. This is represented by memorandum directed to Complainant as well as the various PACE plans and evaluations completed. Again, as the evidence suggests, the problems in Complainant's ability to timely process past due invoices was present well before Complainant's medical leave. Respondent attempted various means of having Complainant improve her performance. Suggestions with regard to the processing of 5500 forms, organization, and filing were made. Interim evaluations were conducted to facilitate better performance and to highlight Complainant's failures. Corrective actions were imposed to further facilitate better performance and to provide notice to the employee that there was a performance problem. Direct orders were made to insure that the processing of past due invoices occurred.

Unfortunately, Complainant was never able to make the necessary improvements in her performance. Rather, Complainant maintained ignorance of fiscal rules, failed to get caught up, complained about workload, and argued about retaliation. Nevertheless, the work was never completed. Complainant was given approximately one year to remedy the problems associated with the processing of past due invoices. She was not able to accomplish this task. Her interim evaluations consistently indicate that she was to process past due invoices within 45 days, was to communicate why such invoices might not be paid to her supervisors, and that she was to eliminate any outstanding past due invoices. She never was able to significantly improve in these areas.

Board Rule R8-2-5 allows Respondent to dismiss an employee who fails to improve performance after receiving a needs improvement rating and corrective action. Complainant was given time and opportunity to improve performance and failed to do so. Respondent could and did exercise the option of termination citing that Complainant failed to comply with efficient standards of service and for willful failure to perform duties as assigned.

III.

Complainant fails to offer any evidence to the fact finder that Respondent was acting arbitrarily and capriciously. The argument of Respondent retaliating against Complainant for having attended a JBC hearing is without merit. First and foremost, the hearing occurred in 1995. If retaliatory action was to have occurred, it most likely would have occurred prior to 1997. In addition, as the documentary evidence clearly indicates, Complainant was failing to timely process past due invoices since 1996. In other words, a significant "paper trail" exists to demonstrate that Respondent's actions were not retaliatory, but were taken as a result of poor performance.

Complainant makes various other arguments that Respondent acted arbitrarily and capriciously, including that Respondent failed to provide access to a new computer system. However, solicited testimony shows that there was no computer system available which Complainant could utilize which would improve her performance. Finally, Complainant maintains in both appeals that there was an improper delegation of appointing authority, thereby voiding any discipline imposed. Complainant failed to solicit any testimony, or provide any documentary evidence which would negate Respondent's evidence that the delegation of authority was appropriate.

CONCLUSIONS OF LAW

I. Reduction in Pay Administered June 20, 1997.

- 1. Complainant engaged in the acts for which discipline was imposed.
- 2. The discipline imposed was within the range of reasonable alternatives available to the appointing authority.
- 3. The delegation of appointing authority was conducted pursuant to the State Personnel Board rules.
- 4. The actions of Respondent were not otherwise arbitrary, capricious, or contrary to rule or law.

II. Disciplinary Termination from Service of November 18, 1997.

- 1. Complainant engaged in the acts for which discipline was imposed and her employment was terminated pursuant to Board rules.
- 2. The discipline imposed was within the range of reasonable alternatives available to the appointing authority.
- 3. The delegation of appointing authority was conducted pursuant to the State Personnel Board rules.
- 4. The actions of Respondent were not otherwise arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's action is **UPHELD**. Complainant's appeal is dismissed with prejudice. Neither party is entitled to an award of attorney fees as provided in section 24-50-125.5, C.R.S.

Dated this 16th day of March, 1998 at Denver, Colorado

G. Charles Robertson Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double

spaced and on 8 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this		1 0
Nora V. Kelly, Esq. Nora V. Kelly, P.C. 1776 Lincoln Street, Suite 418 Denver, CO 80203		
and in the interagency mail, addressed	as follows:	
Toni Jo Gray Assistant Attorney General 1525 Sherman Street, 5th Floor Denver, CO 80203		